STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL L. DAYMON and KATHRYN DAYMON, Plaintiffs-Appellees,	UNPUBLISHED October 5, 2004
v	No. 249007 Gratiot Circuit Court
TED L. FUHRMAN, Defendant-Appellant	LC No. 00-006637-CZ
and	
E-Z LIVING HOMES, INC., Defendant.	

Before: Murray, P.J., and Markey and O'Connell, JJ.

MURRAY, P.J. (*dissenting*).

On de novo review of the trial court's decision in this case, *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996), I would reverse and remand for entry of a judgment in favor of defendant. In doing so, I would not at all disturb the trial court's findings of fact, for reversal is necessary in this case because plaintiffs failed to submit evidence establishing that they suffered an injury that resulted from defendant's misuse of the corporate entity.

As the majority correctly notes, *Foodland Distributors* generally requires that three elements be established before a court can disregard the corporate veil. They are:

> "'First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff.'" [*Foodland Distributors*, *supra* at 457, quoting *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994).]

Although the majority correctly concludes that the first *Foodland Distributors* prong has been met, it was nevertheless improper to pierce the corporate veil in the instant case. The second and third elements used to determine whether the corporate veil should be pierced require

that the corporate entity be used to commit a fraud or wrong, which in turn caused there to be an unjust injury or loss to plaintiffs. The following principles guide this Court in reviewing these two elements:

> Although it is clear that the corporate form may be disregarded to prevent injustice and to reach an equitable result, we believe that the injustice sought to be prevented must in some manner relate to a misuse of the corporate form short of fraud or illegality. If the rule were otherwise, an equal injustice or inequity could result. [*Soloman v Western Hills Dev Co (After Remand)*, 110 Mich App 257, 264; 312 NW2d 428 (1981).]

Regarding the second prong, plaintiffs contend that they were injured due to defendant's commingling of funds,[1] defendant's seizure of leasehold improvements, defendant's taking of corporate assets without consideration in order to prevent plaintiffs (and other creditors) from seizing them for collection, and defendant violating the UFTA. First, there is no evidence to demonstrate that defendant seized the leasehold improvements in order to avoid paying creditors such as plaintiffs. Although the evidence demonstrated that defendant personally took title to a number of improvements to the real property, those assets taken were subject to mortgages or perfected security interests with "close to $200,000" remaining to be paid.[2] Further, there was no evidence that defendant ceased business in an attempt to avoid plaintiffs as creditors. This is apparent as defendant ceased business operations in April 1998, but plaintiffs did not obtain judgment against the corporation until October 1998.[3] Additionally, plaintiffs' argument that defendant removed assets that would otherwise have been used to pay plaintiffs' default judgment is without merit. It is undisputed that the corporation's debts to creditors with priority over plaintiffs exceeded the corporation's assets, and plaintiffs' judgment would not have been satisfied anyway, so piercing the corporate veil was inappropriate.

Importantly, there is also no evidence establishing that plaintiffs' unsatisfied judgment resulted from defendant's "flexible" use of the corporate accounts. Both our Court and the Supreme Court have made clear that the excessive control over the corporation must be "exercised in such a manner *as to defraud and wrong the complainant*, and that unjust loss or injury will be suffered by the complainant *as the result of such domination . . . .*" *Gledhill v*

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[1] Although plaintiffs focus on defendant's commingling of funds, this relates to the first element of the test used to determine whether to pierce the corporate veil. Plaintiff must also demonstrate a fraud or wrong and an unjust loss or injury. While defendant and his corporation shared a unity of interest, that alone is insufficient to pierce the corporate veil unless the corporation was used to commit a wrong. *SCD*, *supra* at 382.

[2] Assuming defendant had not undertaken the debts owed along with the property improvements, the secured creditors presumably would have collected on them. When a guarantor of debts, such as defendant in this case, pays a third party's debt to a creditor, that guarantor acquires that creditor's rights through subrogation. *Shurlow v Bonthuis*, 456 Mich 730, 739-740; 576 NW2d 159 (1998).

[3] The complaint was not filed until June 1998.

Fisher & Co, 272 Mich 353, 358; 262 NW 371 (1935) (emphasis added). See also *Soloman, supra* at 263, quoting *Kline v Kline*, 104 Mich App 700, 702-703; 305 NW2d 297 (1981), for the proposition that the corporate entity itself must be used to subvert the ends of justice. There was no dispute in the record that the insolvency resulted from an accounting error made some three years before defendant declared insolvency, and which was completely unrelated to defendant's use of corporate funds for his personal matters. As such, there exists no evidence that plaintiffs' injuries resulted from defendant's improper use of the corporate form.

Indeed, this case does not present a scenario where the individual shareholder has funneled money from the corporation, or saddled it with his own personal debt, which resulted in an injury to the plaintiffs. Rather, plaintiffs have been left without a remedy due to the corporation's insolvency that resulted from an accounting error made years earlier, not from the fortuitous circumstance of defendant's "flexible" use of the corporate accounts. In other words, nothing in the record or trial court decision disputes the fact that plaintiffs would be without a remedy even if defendant had never used the accounts for personal matters.

"A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." MCL 566.32(1). The evidence shows that the corporation was *already* insolvent at the time of the transfer. Whether defendant took the assets personally or whether the secured creditors took the assets, plaintiffs were without recourse when the company ceased operations. Even presuming defendant's actions were wrongful, defendant did not affect the company's net worth with respect to plaintiffs and did not, therefore, cause plaintiffs any additional harm.

The trial court also erred in determining that defendant violated the UFTA. The facts do not show, and the trial court did not conclude, that defendant had any actual intent to hinder, delay, or defraud any creditors. MCL 566.34(1)(a). Therefore, to violate the UFTA, the company must not have received "a reasonably equivalent value in exchange for" the assets transferred to defendant personally. MCL 566.34(1)(b). Although the company received no benefit in exchange for the transfer of assets, the assets were themselves functionally valueless because they were encumbered by more debt than they were otherwise worth, and could be considered, as over-encumbered, "reasonably equivalent" to the value given by defendant. Moreover, defendant was subrogated to the company's secured creditors' rights by paying the liens and was therefore entitled to reach the assets in any event.

As a result of the foregoing, I would reverse and remand for entry of a judgment in favor of defendant.

/s/ Christopher M. Murray